



POLICE DEPARTMENT

August 25, 2023

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In the Matter of the Charges and Specifications	:	Case No.
- against -	:	2022-27060
Lieutenant Benjamin Cui	:	
Tax Registry No. 932505	:	
Auto Pounds	:	

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At: Police Headquarters
One Police Plaza
New York, NY 10038

Before: Honorable Anne E. Stone
Assistant Deputy Commissioner Trials

APPEARANCES:

For the Department: Lauren Silverstein & Sophie Kravet, Esqs.
Department Advocate's Office
One Police Plaza, Room 402
New York, NY 10038

For the Respondent: Hugh Mo, Esq.
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To:

HONORABLE EDWARD A. CABAN
POLICE COMMISSIONER
ONE POLICE PLAZA
NEW YORK, NY 10038

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CHARGES AND SPECIFICATIONS

1. Said Lieutenant Cui, while on duty as a Probationary Captain and assigned to the 104 Precinct, on or about February 14, 2022, engaged in employment discrimination in violation of Department policies. (*As amended*)

A.G. 332-01, Paragraphs A, C, and E

EMPLOYMENT
DISCRIMINATION

REPORT AND RECOMMENDATION

The above-named member of the Department appeared before me on June 27, and July 5, 2023. Respondent, through his counsel, entered a plea of Not Guilty to the subject charge. The Department called Police Officer Liam Dale and Police Officer Kelly Wong as witnesses. Respondent called retired Chief Thomas Chan, as a witness, and also testified on his own behalf. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review. Having evaluated all the evidence in this matter, I find Respondent Guilty of the single charge, and recommend the forfeiture of thirty (30) vacation days.

ANALYSIS

The following is a summary of the facts which are not in dispute. On or about February 14, 2022,¹ Respondent was working at the 104 Precinct as Executive Officer. Following the formal roll call for the third platoon, which was conducted by Sergeant Diaz, Respondent called the officers back into the muster room for additional guidance. Approximately 10-15 officers, including Police Officers Dale, Wong, and Feliciano attended this second roll call. While addressing the group, Respondent asked Police Officer Wong and Police Officer Feliciano, who

¹ Respondent's attorney on the second day of trial asserted that the date of the occurrence was actually February 13, 2022, as Respondent was RDO on the 14th. Respondent did not object to continuing the trial and referring to the date of the incident as on or about February 13 or 14, 2022.

are both female, whether they were partners. They responded that they were. Respondent stated, in sum and substance, "two females shouldn't be working together; female officers do not have upper body strength; female officers need male officers to help them in a fight; and men will take advantage of female officers." Additionally, Respondent went on to state, in sum and substance, "Members of the service of the same race should not be in the same car." (Tr. 248-51)

Respondent issued no orders as a result of the comments made at this informal roll call. No steady partners in the 104 Precinct were separated; Police Officers Wong and Feliciano continued to work together when possible. This included a date, not long after the roll call, when Respondent arrived at the scene of a radio-run to which Officers Wong and Feliciano had been assigned. Officer Wong and Respondent had a conversation in which she stated, in sum and substance, "Just because two females are together doesn't mean we can't handle ourselves. There's guys who freeze up and don't do anything. And with her, I'm safe. I feel safe. And I know [we] can handle ourselves." (Tr. 57)

At some point both Officer Dale and Officer Wong were asked about the roll call by the Patrolmen's Benevolent Association delegate, Police Officer Valdemar, who then reported the incident to the precinct Commanding Officer. Subsequently, an official complaint was made to the Equal Employment Opportunity Division, "EEOD." Police Officer Wong and Police Officer Dale were each interviewed by members of the EEOD regarding this incident, and neither of them chose to pursue a formal complaint against Respondent. (Tr. 29-30, 55-56)

The issue before this tribunal is not whether Respondent made the above referenced comments; he admits to having made them. The testimony at trial focused largely on the message Respondent was trying to convey, the way the subordinates perceived the comments, and ultimately, whether they constitute sanctionable misconduct.

Police Officer Kelly Wong testified that she has worked for the Department for approximately 15 years, and has been assigned to the 104 Precinct for almost 14 years in various capacities, including as a patrol officer. On or about February 14, 2022, she recounted that she was standing next to her partner, Officer Feliciano,² during the informal roll call convened by Respondent when he “pointed us out and said do you two work together? And we said yes. And he says two females shouldn’t work together. It’s not a gossip session where we hehehe and play and gossip. Let’s –let’s be real. Two females can’t work together because they can’t defend themselves because they don’t have the upper body strength.” Respondent also told the group that female officers need a man to work with them to help defend them. (Tr. 53) Officer Wong recalled Respondent asserting he didn’t want officers of the same race to be assigned to the same car “so there won’t be any allegations.” (Tr. 53)

Police Officer Wong stated that she wasn’t bothered by the general comments made by Respondent regarding women needing to be with male partners or people of different races needing to be paired up. What upset her was that Respondent was saying that she gossips; she felt he was “judging” her. She explained, “You are looking at me thinking I’m taking this job as a joke...Now that’s going to make me look bad.” Officer Wong also testified that she had never been spoken to by any other supervisor regarding gossiping. (Tr. 53-55)

According to Officer Wong, at a later date when Respondent approached her and Officer Feliciano at a radio run, he again asked if they worked together. Officer Wong “cut him off” and stated, “[j]ust because two females are together doesn’t mean we can’t handle ourselves.” She also testified that her interactions with Respondent after this incident were “friendly.” (Tr. 79)

² Officer Feliciano has since left the Department.

Police Officer Liam Dale testified that he has been in the Department for four and a half years, all of which he has spent in the 104 Precinct. On the date in question, he and other officers stayed behind after roll call at the request of Respondent to hear "his recommendations for tactics while on patrol." (Tr. 25) Officer Dale testified that after Respondent asked Officers Wong and Feliciano if they were partners, he informed the group that he doesn't believe two female officers should work together because "as a female, you don't take the job to, like, paint your nails and gossip." (Tr. 28) Officer Dale testified that when Respondent made that statement, he was "taken aback" and "shocked." (Tr. 28) He recalled that he didn't listen to anything else Respondent said for the rest of the meeting because he was so surprised by the comments that he "checked out." According to Officer Dale, after Respondent left the room there was a group discussion about what had been said, "Like oh, did you hear what he just said...about two females working together." (Tr. 29)

At trial, Respondent described his employment history, including military service, and approximately ten years on patrol, his promotion to Captain, and assignment to the 104 Precinct in January 2022. (Tr. 212-17) Respondent had been a probationary captain for just a few months, and had been at the 104 Precinct for only about three to four weeks when he addressed the third platoon roll call at issue in this case. (Tr. 241-42) Respondent was candid when he described his passion for sharing his experiences and opinions with younger officers in order to help them avoid making mistakes he made. (Tr. 223-24) Indeed, he shared several incidents that contributed to his preference for diversity in staffing. Respondent, an Asian male, testified about an arrest he made while partnered with another male of Asian descent, during which the suspect used anti-Asian slurs against both officers. He went on to describe that after the arrival of a back-up officer, who was Hispanic, the officers were able to gain voluntary compliance from the

Hispanic arrestee. This incident led to Respondent's belief that when there is an opportunity for officers of different races to be assigned as partners, they should be. (Tr. 229-34)

Respondent related another incident that informed his opinion regarding the value of having partners of different races. The incident occurred when he was partnered with a male Caucasian. Respondent and this unnamed officer stopped an individual in a NYCHA development on suspicion of trespass. A crowd formed, accusing the officers of violating the individual's rights. One man pulled Respondent to the side, stating in sum and substance, "[S]crew that guy. He's a White dude, he doesn't have your back." Respondent took advantage of the trust the man had in him to de-escalate the situation, and safely extricate himself and his partner. (Tr. 238-41) Respondent recounted a third incident in which he berated two male officers for placing a female suspect into a Department vehicle without searching her, because there were no female officers on the scene. (Tr. 234-38) Respondent testified, "Diversity in the Department is a great asset." (Tr. 241)

On the date in question Respondent wanted to address the third platoon roll call because of "tactical and safety issues" he observed regarding car stops. (Tr. 245) Respondent recalled asking Officer Wong who her partner was. Upon learning it was Officer Feliciano, he stated to the group, "I prefer two female officers not riding in the same car. And I prefer to see mixed gender and mixed race officers in a sector car." (Tr. 248) According to Respondent, someone in the group was "giggling" and talking in the back and Respondent told them, "this is not a hangout session...Don't come here to gossip." (Tr. 249) He denied making any comments about female officers painting their nails. (Tr. 255) Respondent admitted that he made statements about female officers lacking upper body strength and needing a male officer to help them in a physical fight. Respondent disputed that he was "announcing a policy" or "making any orders" with these

statements. He insisted that he did not intend to demean or marginalize anyone, and noted that he did not break up any steady partners during his tenure as Executive Officer. (Tr. 256)

Respondent also testified about the night, sometime after the roll call, when he responded to a radio run and spoke to Officer Wong. According to him, "[he was] so glad I saw her that night. That she [has] proven to me that she's a tough cookie and I don't have to worry about her." (Tr. 260)

Respondent called retired Chief Thomas Chan, as an expert on tactics, safety, the deployment of police resources, and the role of the Executive Officer in a precinct. His career spanned 38 ½ years, during which he served in both patrol and administrative commands. He conducted hundreds of roll calls, and regularly made decisions regarding the allocation of Department resources, including appropriate assignment of personnel. Chief Chan was familiar with the statements made by Respondent. He offered the opinion that there were times when it might be appropriate to consider the gender or race of a police officer when making a decision regarding assignment for logistical and practical reasons. Chief Chan discussed the value of having officers who have special skills, such as proficiency in a second language, and opined there may be occasions when assignments should be made in order to best utilize that expertise. (Tr. 181-82)

Respondent is charged with discriminatory conduct in violation of Department policy when he made the aforementioned comments about gender and race to subordinates during a roll call. There is no dispute that Respondent made the comments in question, and that he was acting in his capacity as Executive Officer when he made them.³ At issue, is whether the statements

³ Some variation exists in the witnesses' memories of the exact statements made. PO Dale mentioned "painting nails and gossiping, while PO Wong mentioned "gossip sessions where we hehehe and play." The differences are minimal, and, the intent of the statements is clear. Indeed, Respondent even said he admonished members present at

constituted employment discrimination as defined in Administrative Guide section 332-01, which prohibits all forms of employment discrimination in the workplace. I find that the Department has met its burden of proof that Respondent violated Paragraph E of A.G. 332-01, by making statements at an informal roll call which were “disparaging and disrespectful” to female members of service.

Administrative Guide 332-01, as well as Title 8 of the Administrative Code of the City of New York (“New York City Human Rights Law”), section 107(1)(a), prohibit discrimination in the terms, conditions, or privileges of employment based upon gender, race, or membership in any other protected class. To prevail, the Department must prove that Respondent, through his statements, “treated [Officer Wong] less well than other employees because of her gender.” *Williams v. New York City Hous. Auth.*, 61 A.D.3d 62 (1st Dep’t 2009). Additionally, the Department would have to prove that the statements at issue here exceeded “what a reasonable victim of discrimination would consider petty slights and trivial inconveniences.” *Id.* at 80. This tribunal appreciates that the allocation of personnel and resources needs to be done strategically, and that decisions about these matters are within the discretion of supervisors, including the Executive Officer. Indeed, Chief Chan testified that situations do arise where the most prudent allocation of resources may require separating officers of different capabilities. However, Respondent’s comments went beyond mere comment on tactical allocation of resources. The Executive Officer of a command telling a group of subordinates that he “prefers” not to have two female officers working together in a patrol car because they lack upper body strength and need male officers to assist them, is disparaging to women.

the meeting that it was not a “gossip session”, which makes it clear that his statements included a reference to gossip.

By making these statements to a large group of his subordinates, Respondent was, discounting the capabilities of all female officers in the command and saying that they cannot do the job. Indeed, this was further illustrated when Officer Wong, upon meeting up with Respondent at a later date, defended herself and her partner, by pointing out to him that they could “handle” themselves. Respondent, in turn, acknowledged that he appreciated her “proving” that she is a “tough cookie.” As the First Department has noted, even “a single comment that objectifies women . . . made in circumstances where that comment would, for example, signal views about the role of women in the workplace [may] be actionable.” *Id.* at 80, *n.* 30; *see also Hernandez v. Kaisman*, 103 A.D.3d 106, 115 (1st Dep’t 2012); *Golston-Green v. City of New York*, 184 A.D.3d 24, 43 (2d Dep’t 2020) (Commanding officer “plainly expressed a view about women in the workplace” when he stated that he did not “like women on the job because they have babies.”)

The Merriam-Webster dictionary lists the following synonyms for disparage: diminish, discount, minimize, belittle. This is exactly what Respondent did when he made these comments about Officers Wong and Feliciano, simply because they are women. Accordingly, Respondent is found Guilty of Specification 1.

In making this finding, I determine that there was no misconduct with respect to the notably different and vague statement Respondent made about preferring to have individuals of different races assigned together. When making this statement, Respondent did not elaborate regarding his reasoning beyond indicating that the practice would avoid “allegations or conflicts of interest.” While the statement showed poor judgment for an Executive Officer addressing a group of subordinates, there was no evidence that the comments created a hostile work

environment in which employees of different races were subject to a workplace where they were treated less well than others because of their race.

PENALTY

In order to determine an appropriate penalty, this tribunal, guided by the Department's Disciplinary System Penalty Guidelines, considered all relevant facts and circumstances, including potential aggravating and mitigating factors established in the record. Respondent's employment history also was examined. *See* 38 RCNY § 15-07. Information from his personnel record that was considered in making this penalty recommendation is contained in an attached memorandum.

Respondent, who was appointed to the Department on July 1, 2003, has been found Guilty of employment discrimination by making disparaging remarks about female officers.

The Department has recommended a penalty of fifty-five (55) vacation days, one-year dismissal probation, and remedial EEOD training.⁴ I find that recommendation to be excessive in light of the circumstances surrounding the comments, as well as the substance of what was proven at trial.⁵ For the reasons set forth below, I recommend a penalty of forfeiture of thirty (30) vacation days.

By making discriminatory comments about female officers, Respondent disparaged the women assigned to his command, thereby violating paragraph E of Administrative Guide 332-

⁴ While the Tribunal would be inclined to recommend remedial EEOD training for Respondent, at the conclusion of the investigation of this matter, in September, 2022, Respondent was ordered by the Police Commissioner to attend such training. As per his TACTICS Certification Summary, he completed that training on March 3, 2023.

⁵ Respondent's counsel repeatedly brought up the demotion of Respondent from probationary Captain to Lieutenant in March 2023 as a mitigating factor to be considered when determining penalty. However, demotion from a probationary title is a process which is completely separate from the formal disciplinary process. The probationary period allows the Police Commissioner to assess the member's performance in the title, and demote if they are not performing at the expected level. As such, while the tribunal appreciates the impact the demotion has had on Respondent's career, it will not be part of my assessment of penalty in this matter.

01. The penalty range for this misconduct includes a mitigated penalty of ten (10) days through an aggravated penalty of termination, with a presumptive penalty of twenty (20) days (Disciplinary Matrix p. 50).

In this case, because I find there were no aggravating factors present, the presumptive penalty of the loss of twenty (20) penalty days is an appropriate starting point to address the misconduct. I note, however that Respondent has been the subject of previous discipline, for which he received a significant penalty. In 2014, Respondent forfeited 30 vacation days and was placed on dismissal probation for two disciplinary cases. In that first previous matter, Respondent pled guilty to failing to notify a supervisor and wrongfully attempting to contact a motorist after learning that motorist called 911 to report an off-duty incident with Respondent's vehicle. In the second case, Respondent pled guilty to using excessive force against two individuals during an altercation which occurred while he was off-duty. While these two incidents are remote in time, and not the same type of misconduct as the current case, under progressive discipline, the forfeiture of an additional ten (10) penalty days is appropriate. The Department also recommended one (1) year dismissal probation. Under the specific facts of this case, I am not persuaded that a period of monitoring is necessary to achieve the Disciplinary Guidelines' goal of deterring future misconduct.

Accordingly, I recommend that Respondent forfeit thirty (30) vacation days.

Respectfully submitted, *by JSA*

/s/ Anne E. Stone

Anne E. Stone

Assistant Deputy Commissioner Trials

APPROVED

Edward A. Caban
DEC 12 2023
EDWARD A. CABAN
POLICE COMMISSIONER



POLICE DEPARTMENT CITY OF NEW YORK

From: Assistant Deputy Commissioner – Trials

To: Police Commissioner

Subject: SUMMARY OF EMPLOYMENT RECORD
LIEUTENANT BENJAMIN CUI
TAX REGISTRY NO. 932505
DISCIPLINARY CASE NO. 2022-27060

Respondent was appointed to the Department on July 1, 2003. On his three most recent annual performance evaluations, he received “4.5” overall ratings of “Extremely Competent/ Highly Competent” for 2018, 2019, and 2020. He has been awarded one (1) medal for Meritorious Police Duty, and 17 medals for Excellent Police Duty.

In 2014, Respondent forfeited 30 vacation days and was placed on dismissal probation for misconduct that was the subject of two disciplinary cases involving separate 2011 and 2012 incidents. In the first matter, Respondent pled guilty to (i) failing to notify a supervisor after an alleged off-duty incident involving Respondent’s vehicle and another motorist, (ii) utilizing a Department computer for personal reasons unrelated to Department business, and (iii) attempting to contact a motorist after learning the motorist had called 911 to report an incident with Respondent’s vehicle. In the second case, Respondent pled guilty to, while off-duty and at a local mall, (i) wrongfully shoving a civilian in the chest without sufficient legal authority, and (ii) wrongfully striking a second civilian in the face with his Department shield.

Prior to the imposition of dismissal probation in the above-referenced matter, Respondent was placed on Level 2 Discipline Monitoring from October 2013 to August 2014.

In connection with the instant case, he was demoted from probationary captain to the rank of lieutenant in March 2023.

By JJA
/s/ Anne E. Stone

Anne E. Stone
Assistant Deputy Commissioner Trials